United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAUL J. CARDAROPOLI	)	NOS. 75-2005
JOSEPH MAIDA	)	75-2015
MAURICE H. BARSKY	)	75-2023
LOUIS C. PISELLI	)	75-2024
WILLIAM SILVERMAN	)	75-2025
HOWARD SILVERMAN	)	75-2026
NICHOLAS LASORSA,	)	75-2023
	)	
Petitioners-Appellees,	)	
	)	
v.	)	
	)	
JOHN J. NORTON, WARDEN,	)	
FEDERAL CORRECTIONAL INSTITUTION,	)	
DANBURY, CONNECTICUT, ET AL.,	)	
	)	
Respondents-Appellants	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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PETITION FOR REHEARING

Pursuant to Rule 40, Federal Rules of Appellate Procedure, appellant, John J. Norton, Warden, Federal Correctional Institution, Danbury, Connecticut, petitions this Court for a rehearing of its September 29, 1975, decision affirming the district court's holding that a federal prisoner is entitled to a due process hearing prior to being classified as a special offender by the Bureau of Prisons (BOP). Our petition is limited to seeking reconsideration of the

Court's holding that the required due process hearing includes the prisoner's right to retain counsel or counsel substitute and the right to confrontation and cross-examination, both of which are requirements that conflict with the Supreme Court's holding in Wolff v. McDonnell, 418 U.S. 539, 567-570 (1974).

STATEMENT

Shortly after entering the Federal Correctional Institution at Danbury, Connecticut, appellees, petitioners below, were classified, without notice or hearing, as special offenders. They all brought petitions for writs of habeas corpus in the United States District Court for the District of Connecticut seeking the removal of their special offender classifications, alleging that the classifications unfairly deprived them of furloughs and community treatment centers, and adversely affected their chances for parole.

At about that time, the district court decided Catalano v. United States, 383 F. Supp. 346 (D. Conn. 1974) on facts substantially the same as those presented here. The court found that the special offender classification had "significant" and "dire" consequences for a prisoner, and therefore, the prisoner was entitled to a due process hearing prior to being classified as a special offender.

On the basis of its Catalano decision, the court ordered the Bureau of Prisons (BOP) to expunge the special offender classifications from the petitioners' files and enjoined the BOP from reclassifying

them without first holding the due process hearing set out in Catalano. The hearing procedures required in Catalano include the following: (1) ten days notice prior to the hearing, with a specification of reasons for the proposed designation and a brief description of the underlying evidence sufficient to enable the inmate to marshal facts in his defense; (2) the inmate's personal appearance before the decision-maker with permission to call witnesses and present documentary evidence; (3) opportunity for cross-examination and confrontation of adverse witnesses when the decision-maker cannot rationally determine the facts without it; (4) provision for retained counsel or counsel-substitute when the issues are complex or the inmate appears unable to collect or present his evidence; (5) a hearing officer with no personal knowledge of the basis of the proposed classification; but he may be appointed by the warden and can be the inmate's caseworker; (6) no necessity for transcribing or recording the proceedings; (7) written findings by the hearing officer if he finds the "special offender" classification is warranted; and (8) review of a recommendation for "special offender" by the Chief of Classification and Parole at the institution, by the warden, and by the BOP (Central Office).

On September 29, 1975, this Court adopted the findings and conclusions of the district court in Catalano, in toto, and affirmed the district court's decision in the instant case. This Court has extended the time for filing a petition for rehearing until

November 12, 1975.

ISSUE PRESENTED

Whether a federal prisoner should be allowed to retain counsel or counsel-substitute and to confront and cross-examine adverse witnesses in an in-prison hearing held for the purpose of determining whether the prisoner should be classified as a special offender.

ARGUMENT

While we do not agree with the Court's primary ruling in this case that the Constitution requires a hearing prior to classifying a federal prisoner as a special offender, in light of this Court's holdings in other cases, we do not at this time challenge that ruling. However, we do believe the Court should reconsider its holding that the required hearing includes the right to counsel or counsel-substitute when the issues are complex or the inmate appears unable to collect or present his evidence and the right to confrontation and cross-examination of adverse witnesses when the decision-maker cannot otherwise rationally determine the facts. Neither of these provisions are constitutionally required, their inclusion in this in-prison hearing is in conflict with the Supreme Court's holding in Wolff v. McDonnell, supra, and they will cause numerous problems for the BOP in the administration of the prison system and for law enforcement in general.

In Wolff, the Supreme Court made it clear that the Due Process Clause does not have rigid boundaries. For example, the requirements

of due process in a criminal trial are not the same as the requirements in a hearing where only a person's job is at stake. See Arnett v. Kennedy, 416 U.S. 134 (1974). As the Court stated in Wolff v. McDonnell, supra, at 567: "Rules of procedure may be shaped by consideration of the risks of error, (citations omitted), and should also be shaped by the consequences which will follow their adoption."

Applying these considerations to the disciplinary hearing required in Wolff, the Court found that neither confrontation and cross-examination nor retained or appointed counsel were required. Id. at 567-570. The conflict between that holding and the holding in the case at bar allowing those procedures, is brought into sharper focus when the interests at stake in the respective hearings are considered. On the one hand, in the disciplinary hearing, the inmate stands to lose good-time credits which would have allowed him to be released from prison months earlier than he otherwise would, or he might be placed in solitary confinement. These are clearly substantial liberty interests which the inmate may have taken away from him if the hearing goes against him. On the other hand, in the special offender hearing, the inmate, if classified as a special offender, will (accepting this Court's findings for the purpose of argument) only be hindered or precluded from eligibility for certain rehabilitative programs within the prison system. Plainly these interests are not as substantial as the liberty interest at stake

in the disciplinary hearing. Hence, there is even less reason, with respect to the interests at stake, to require allowance of counsel and confrontation/cross-examination in this case than there was in Wolff where neither procedure was required.

There are, of course, other considerations involved, such as the consequences of allowing such procedures. In both the disciplinary hearing in Wolff and the special offender hearing, the allowance of such procedures will inevitably cause the proceedings to "be longer and tend to unmanageability". Id. at 567. Although confrontation and cross-examination in the special offender hearing may not have as much potential for prison disruption as the disciplinary hearing, because most witnesses confronted in the former would not be fellow inmates, it would have other consequences equally as disastrous for prison administration and law enforcement in general. Much of the information which forms the basis of the special offender classification for those inmates involved in organized crime comes from confidential informants. Such information ends up on a presentence report or other document, as the Court notes at page 89 of its slip opinion. However, the real source of the information, the confidential informant, does not appear on the document, and thus, when the prisoner challenges the basis of his classification, it will simply be his word and/or evidence against the information on the document. If he is then given the right to confrontation and cross-examination, the government may be forced to

reveal the identity of its confidential informant. If the identities of confidential informants are revealed, there will be reprisals against such informants by other organized crime members, and soon, the government will be without informants. The importance of informants in the fight against organized crime cannot be overemphasized, and a decrease in the number of informants coming forward would be a great detriment to law enforcement.

The consequences of allowing inmates to retain counsel or to have counsel-substitute when the issues are complex or the inmate appears unable to collect or present his evidence would be equally as problematic in a special offender hearing as the Supreme Court found it to be in a disciplinary hearing:

> The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings. Wolff, supra, at 570.

Moreover, organized crime members, classified as special offenders, will undoubtedly bring in a battery of high-powered counsel who, of course, will fight every move made by the hearing-examiner. The hearing-examiner, who will not be a lawyer, will have difficulty dealing with procedural objections and legal contentions of the inmate's counsel. Of necessity, the government will have to provide its own counsel to effectively present its position. As stated in Wolff, supra, such an adversary cast to the proceedings would not be conducive to an efficient hearing which would further correctional goals.

In Wolff the inmate who is faced with complex issues and is unable to collect or present his evidence in a disciplinary hearing is allowed the assistance of a fellow inmate or help from the staff or a sufficiently competent inmate designated by the staff. There is no reason why such procedures should not be used in the special offender hearing, thus avoiding the problems which would ensue if retained counsel were permitted.

This Court indicated that the allowance of retained counsel and confrontation/cross-examination, while admittedly problematic, would not cause undue disruption or danger because both procedures were subject to limitation by the hearing-examiner. However, inmates will claim the right to counsel and cross-examination in every case, because, of course, it is to their advantage. And the hearing-examiner's decision not to allow such procedures will be challenged in every case, which will lead to further litigation. The wiser approach, we believe, was taken by the Supreme Court in Wolff, where it stated in regard to allowing confrontation, cross-examination:

> There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases. Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there would be a limited basis for upsetting such judgments. The better course at this time, in a period where prison practices are diverse and somewhat experi-

mental, is to leave these matters to the sound discretion of the officials of state prisons. Wolff, supra, at 569.

CONCLUSION

For the foregoing reasons, appellants respectfully submit that the petition for rehearing should be granted, and that this Court should amend its original opinion, in accordance with Wolff, so as not to allow inmates the right to retained counsel or counsel-substitute and the right to confrontation, cross-examination in the special offender hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITION FOR REHEARING was mailed to Appellee Cardaropoli's counsel, Pierce O'Donnell, 1000 Hill Building, Washington, D.C. 20006, on November 19, 1975.

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